

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

vs.

**1:17-cr-36
(MAD)**

JACOB E. EBEL,

Defendant.

APPEARANCES:

OF COUNSEL:

**OFFICE OF THE UNITED
STATES ATTORNEY**

James T. Foley U.S. Courthouse
445 Broadway, Room 218
Albany, New York 12207-2924
Attorneys for the Government

MICHAEL S. BARNETT, AUSA

OFFICE OF FREDERICK RENCH, PLLC

646 Plank Road
Suite 204
Clifton Park, New York 12065
Attorneys for Defendant

FREDERICK RENCH, ESQ.

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

In a four-count Indictment dated February 22, 2017, Defendant was charged with conspiracy to distribute and possess with intent to distribute controlled substances, distribution of controlled substances with serious bodily injury and death resulting from use of the controlled substances, distribution of controlled substances with death resulting from use of the controlled substances, and possession with intent to distribute controlled substances. *See* Dkt. No. 5 at 1-3.

In a motion dated January 10, 2019, Defendant seeks the following relief: (1) an order pursuant to

Rule 404(b) of the Federal Rules of Evidence requiring the Government to disclose any crime, wrong or act of Defendant which the Government intends to use at trial for any purpose; (2) an order pursuant to Rule 12 of the Federal Rules of Criminal Procedure suppressing and excluding from the trial of this action any physical evidence seized by law enforcement officers from Defendant's person or residence pursuant to the search warrant executed by law enforcement officers on July 26, 2016, at 6 Rowland Road, Kinderhook, New York; (3) an order pursuant to Rule 12 excluding from use at trial any alleged inculpatory statement or admission, whether written or oral, that was involuntarily made by Defendant in violation of his Fifth and Sixth Amendment rights and in violation of *Miranda v. Arizona*; and (4) an order granting leave to renew or initiate new motions. *See* Dkt. No. 43.

As set forth below, Defendant's motion is denied.

II. BACKGROUND

In a July 26, 2016 search warrant application, New York State Police Investigator Andrew Behrens detailed the results of an investigation, conducted in conjunction with the Columbia County Sheriff's Office, regarding numerous death cases relating to opiate toxicity. *See* Dkt. No. 43-1 at 14-15.¹ During the course of the investigation, three decedents were identified: Shawn Butcher, Lynde Noel, and Sierra Spagnola. *See id.* at 15.

On July 3, 2016, at approximately 4:53 p.m., the New York State Police began an investigation into the death of Shawn Butcher. *See id.* On that date, the State Police responded to an "Echo-Level" EMS call for an unresponsive male, later identified as Shawn Butcher, whom was located in a vehicle at the intersection of Concourse and Lake Road in Kinderhook, New

¹ To avoid confusion, anytime the Court references a specific page number for an entry on the docket, it will cite to the page number assigned by the Court's electronic filing system.

York. *See id.* Subsequent to initial lifesaving efforts, the State Police conducted a Vehicle Inventory Search and found a loaded, uncapped syringe on the center console, accompanied by a bottle cap with heroin residue, a filter, and a folded note marked "40," which contained a powdery substance believed to be heroin. *See id.* Additionally, the State Police retrieved a cell phone belonging to Mr. Butcher, identified as an LG Cell Phone bearing serial number 511VTDN0997426. *See id.*

On July 8, 2016, after extensive lifesaving efforts at Albany Medical Center, Mr. Butcher was taken off additional life support and died. *See id.* The New York State Certificate of Death was completed by Dr. Michael Sikirica, who identified the "Manner of Death as Undetermined Circumstances, with the immediate cause being Multisystem Organ Failure due to Anoxic Encephalopathy consistent with Acute Opiate (Heroin) Intoxication." *Id.*

According to the search warrant application, on July 13, 2016, the previously identified cell phone (LG Cell Phone bearing serial number 511VTDN0997426) belonging to Mr. Butcher, was examined by the New York State Police Computer Crimes Unit. *See* Dkt. No. 43-1 at 16. During the initial examination and subsequent extraction report, it was determined that Mr. Butcher had corresponded with contact "E Jake" with the assigned phone number (518)929-4136, which was known and confirmed to be the phone number used by Jacob E. Ebel. *See id.* It was further determined that on July 3, 2016, at approximately 1:47 p.m., Mr. Butcher contacted Jacob Ebel and asked "'I got 40, can you plezzz,' to which Ebel responded 'Yea stop by.'" *Id.* According to Investigator Behrens, based on his training and experience, as well as previous conversations between Butcher and Ebel, "it was determined that Butcher was attempting to purchase forty dollars' worth of heroin." *Id.* It was further relayed that the conversation was "consistent with the property located by the State Police, on July 3, 2016 within the vehicle

occupied by Butcher, consisting of a folded posted note marked '40', which contained a powdery substance believed to be heroin." *Id.*

In the search warrant application, Investigator Behran further explains that on July 9, 2016, at approximately 10:58 p.m., the New York State Police began an investigation into the death of Lynde M. Noel. *See id.* On that date, the State Police responded to 49 June Street, in Kinderhook, New York for a 911 call regarding a possible drug overdose/cardiac arrest of a twenty-seven year old female. *See id.* Ms. Noel was located lying in a prone position unresponsive on the bathroom floor by her sister. *See id.* Ms. Noel was found to be in possession of a hypodermic needle at the time of the incident, consistent with intravenous use of heroin. *See id.* On July 11, 2016, after extensive lifesaving efforts at St. Peter's Hospital, Ms. Noel was taken off of life support and died. *See id.*

On July 20, 2016, the cell phone owned and used by Ms. Noel, identified as LG 32VL, ESN 089394842301253121, was examined by the State Police. *See id.* During the initial examination and subsequent extraction report, it was determined that Ms. Noel had corresponded with telephone number (518)221-7229, which was known to be the phone number used by Kimberly M. Bates. *See id.* at 16-17. It was further determined that on July 9, 2016, Ms. Noel had contacted Ms. Bates just prior to the time of the incident. *See id.* at 17. Investigator Behrens claims that, based on the investigation, his experience, and information obtained by a confidential informant, Ms. Bates was a known associate and sold heroin for Jacob E. Ebel. *See id.*

On July 23, 2016, at approximately 10:47 a.m., the Columbia County Sheriff's Office began an investigation into the death of Sierra M. Spagnola. *See id.* On that date, the Sheriff's Office responded to 8 Sunnyside Road, in Stuyvesant, New York in response to a 911 call regarding a nineteen-year old female, who was found unresponsive. *See id.* Despite initial

lifesaving efforts, Ms. Spagnola was pronounced dead at the scene. *See id.*

During the initial investigation, two yellow and one pink post-it notes were located at the scene containing a powdery substance, consistent with heroin. *See id.* Additionally located at the scene was drug paraphernalia consistent with the use of heroin, as well as a plastic bag containing nine pills. *See id.* As part of the investigation, an interview of Ms. Spagnola's husband, Jeremy J. Spagnola, was conducted to determine the source of the heroin. *See id.* Mr. Spagnola informed the investigators that he and his wife had routinely and consistently purchased heroin only from Jacob Ebel. *See id.* Further, Mr. Spagnola "also specifically stated that within the last month, he personally observed Ebel adding/cutting the heroin with a white powdery substance, which Ebel identified as Fentanyl." *Id.* Mr. Spagnola stated that he most recently purchased heroin from Ebel at his residence, located at 6 Rowland Road, in the Town of Kinderhook. *See id.*

According to the search warrant application, on July 25, 2016, members of the New York State Police and Columbia County Sheriff's Office, met with a confidential informant for purposes of continuing the investigation and specifically conducting a controlled buy of heroin. *See* Dkt. No. 43-1 at 17-18. The confidential informant advised that earlier that day he was contacted by Jacob Ebel from a new phone number identified as (518)339-8812. *See id.* at 18. The confidential informant stated that Ebel expressed remorse for the recent deaths, and invited him to his residence at 6 Rowland Drive. *See id.*

The investigators provided the confidential informant with United States currency consisting of five, twenty dollar bills and recorded the serial numbers. *See id.* Additionally, the informant was supplied with both audio and video recording equipment for the purpose of documenting the transaction. *See id.* Prior to going to 6 Rowland Road, the informant's person and vehicle were searched. *See id.* Members of the New York State Police then maintained

constant visual surveillance of the informant while en route and until entering the residence. *See id.*

According to the search warrant application, the confidential informant was met by Ebel at the entry door to the residence. *See id.* The informant was invited into the residence and while inside, began a conversation about Ebel's supply of Fentanyl being stolen. *See id.* Ebel indicated that the Fentanyl was taken from within the freezer, where he showed the informant what he stated to be ecstasy in the form of frozen popsicles. *See id.* Ebel then provided the informant with a white Xanax pill. *See id.* Ebel directed the informant upstairs to his bedroom, where he was directed to strip out of his clothing and Ebel examined his cell phone. *See id.* Ebel then handed the phone to his girlfriend Judy Perciballi, and directed her to take it out of the room. *See id.* While within Ebel's bedroom, the informant and Ebel agreed for the informant to purchase one-half gram of heroin for \$100. *See id.* Ebel then removed a large quantity of heroin from within the headboard of his bed, and weighed out the amount on a digital scale. *See id.* Also located with the heroin was a quantity of cocaine and pills consisting of Adderall and Xanax. *See id.*

The informant provided the \$100 in United States currency and was given the heroin in a plastic shopping bag. *See id.* at 19. Prior to leaving the residence, Ebel directed that the informant return the heroin, stating that he was going to hide it due to the arrival of State Police personnel at the residence. *See id.* Ebel maintained possession of the currency and the heroin which he had sold to the informant. *See id.* The search warrant application indicates that a "portion of this transaction was documented through audio/video digital media, which corroborate and substantiate the informants' [sic] account of same." *Id.*

Based on the information provided, on July 26, 2016, Columbia County Supreme Court

Judge Jonathan Nichols issued a search warrant for the property at 6 Rowland Road in Kinderhook, New York. *See id.* at 11-12. Later that same morning, the search warrant was executed by members of the New York State Police and other law enforcement personnel. *See id.* Following the execution of the warrant, Defendant was taken into custody and driven to the State Police barracks in Livingston, New York. *See* Dkt. No. 43-2 at 1.

In his motion, Defendant argues that the evidence obtained as a result of the search warrant must be suppressed because insufficient probable cause existed for the issuance of the warrant. *See id.* Further, Defendant contends that statements he made after his arrest should be suppressed because they are fruit of the poison tree, *i.e.*, the product of a search warrant not supported by probable cause.

III. DISCUSSION

A. Validity of the Search Warrant

1. *Standard*

"In determining whether probable cause for a search warrant exists, the issuing judicial officer is simply to make a practical common sense decision whether, given the 'totality of the circumstances' set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Barnes*, 399 F. Supp. 2d 169, 178 (W.D.N.Y. 2005) (citing *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)); *see also United States v. Ponce*, 947 F.2d 646, 650 (2d Cir. 1991). A "magistrate's finding of probable cause is itself a substantial factor tending to uphold the validity of this warrant." *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983); *see also United States v. Ventresca*, 380 U.S. 102, 106 (1965) (holding that a magistrate's disinterested finding of probable cause based on reasonable inferences is given preference). "The process does not deal with hard

certainties, but with probabilities." *Gates*, 462 U.S. at 230; *see also United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) ("Probable cause to believe certain items will be found in a specific location . . . need not be based on direct, first-hand, or 'hard' evidence") (internal citation omitted).

It is well settled that an affidavit to a search warrant that relies on hearsay "is not to be deemed insufficient on that score, so long as a substantial basis for crediting that hearsay is presented." *Illinois v. Gates*, 462 U.S. 213, 241-42 (1983) (quotation omitted). Government investigatory agents are entitled to a "presumption of credibility" when a court evaluates their hearsay information in an affidavit. *United States v. Morill*, 490 F. Supp. 477, 478 (S.D.N.Y. 1980) (finding probable cause in an affidavit based in part on hearsay information provided by federal and local law enforcement agents); *United States v. Ventresca*, 380 U.S. 102, 111 (1985) ("Observations of fellow officers of the [federal] Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number"); *Velardi v. Walsh*, 40 F.3d 569, 574 (2d Cir. 1994).

"An evidentiary hearing on a motion to suppress ordinarily is required if "the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question,"" *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992) (quotation and other citations omitted), "including an affidavit of someone alleging personal knowledge of the relevant facts," *United States v. Barrios*, 210 F.3d 355, 2000 WL 419940, *1 (2d Cir. 2000) (citing *United States v. Gillette*, 383 F.2d 843, 848 (2d Cir. 1967); *see also United States v. Ciriaco*, 121 Fed. Appx. 907, 908-09 (2d Cir. 2005); *United States v. Richardson*, 837 F. Supp. 570, 572 (S.D.N.Y. 1993) (holding that "[i]t is well established that without a supporting affidavit of someone with personal

knowledge of the underlying facts, the court need not resolve factual disputes that may be raised by the moving papers"). Moreover, the Local Rules of Criminal Procedure set forth the process that a criminal defendant must follow when the Government disagrees about the need for an evidentiary hearing: "If the parties agree that a suppression hearing is necessary and the papers conform to the requirements of L.R. Cr. P. 12.1(a), the Court will set the matter for a hearing. If the government contests whether the Court should conduct a hearing, the defendant must accompany the motion with an affidavit, based upon personal knowledge, setting forth facts which, if proven true, would entitle the defendant to relief." N.Y.N.D. L.R. Cr. P. 12.1(e).

2. The Warrant is Supported by Probable Cause

Defendant argues that the finding of probable cause is undermined by the fact that the affidavit does not identify the confidential informant by name and does not provide any information regarding his reliability or credibility. *See* Dkt. No. 43-2 at 5. Further, Defendant contends that Investigator Behrens misled the state court when he failed to disclose the fact that Mr. Spagnola was the confidential informant used in the controlled buy. *See id.*

Contrary to Defendant's arguments, courts have held that "even where an affidavit contains no information regarding an informant's reliability, it may still establish probable cause if a law enforcement officer confirmed the information with which the confidential informant provided him [or her] by carrying out a carefully-executed 'controlled buy.'" *United States v. Davis*, No. 5:12-cv-71, 2014 WL 5305984, *16 (D. Vt. Oct. 15, 2014) (quoting *United States v. Garcia*, 983 F.2d 1160, 1167 (1st Cir. 1993); *United States v. Pennington*, 287 F.3d 739, 742 (8th Cir. 2002)). In the present matter, the State Police carried out a "carefully-executed" controlled buy. The confidential informant's person and vehicle were searched prior to the attempted controlled buy, he was outfitted with audio and video recording equipment, he was provided with

paper currency whose serial numbers were recorded by law enforcement, he was physically surveilled on his way to the residence, and the surveillance equipment permitted the officers to observe most of his interaction with Defendant during the controlled buy. Further, the application explains in detail the confidential informant's account of what happened inside Defendant's residence, which was corroborated by a partial video recording of the encounter. Although the affidavit fails to discuss the reliability and credibility of the confidential informant, the evidence was sufficient to support a finding of probable cause. *See Davis*, 2014 WL 5305984, at *16.

Standing alone, the evidence regarding the controlled buy, which occurred only hours before the warrant was issued and executed, would have been sufficient to establish probable cause to search the residence. *See id.* (citing *United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011); *United States v. Martin*, 426 F.3d 83, 86 (2d Cir. 2005)). As the Government correctly notes, however, the search warrant application described other events that support a finding of probable cause. For example, Investigator Behrens described the circumstances in which Shawn Butcher was found on July 3, 2016 at about 4:53 p.m., at the intersection of Concourse and Lake Road in Kinderhook, New York. *See* Dkt. No. 43-1 at 15. It described the heroin and drug paraphernalia found on Mr. Butcher's body, including a folded sticky note marked "40." *Id.* The application went on to describe text communications around 1:47 p.m. on July 3, between Mr. Butcher's phone and a contact called "E Jake," who Investigator Behrens identified as Jacob Ebel based on the telephone number. *See id.* at 16. The text messages included Mr. Butcher telling "E Jake" that "I got 40" and "E Jake" responding "Yea stop by." *Id.*

The search warrant application also described the circumstances in which Sierra Spagnola was found on July 23, 2016. *See id.* at 17. Sheriff's deputies found Ms. Spagnola dead amid three sticky notes "containing a powdery substances, consistent with heroin," along with drug

paraphernalia. *See id.* Ms. Spagnola's husband admitted that he and his wife purchased heroin routinely and exclusively from Defendant and had "most recently" purchased heroin at Defendant's residence. *See id.*

As the Government correctly notes, these summaries concerning the deaths of Mr. Butcher and Ms. Spagnola, each of which was traceable to Defendant and his residence, served to bolster and corroborate the controlled buy that took place at Defendant's residence, mere hours before the search warrant was sought.²

Additionally, the Government now acknowledges that Mr. Spagnola was the confidential informant used in the controlled buy. Defendant takes issue with the fact that the identity of the confidential informant was not revealed to Judge Nichols. Contrary to Defendant's contention, the Government's failure to disclose the identity of the confidential informant or his reliability does not negate Judge Nichols finding of probable cause. The Court must apply a totality-of-the-circumstances test and determine if there would be probable cause if the judge issuing the warrant had been informed that the confidential informant was a first-time informant and heroin addict who had, on prior occasion, purchased heroin that may have killed his wife. *See United States v. Canfield*, 212 F.3d 713, 718-21 (2d Cir. 2000). "The ultimate inquiry is whether, after putting aside erroneous information and material omissions, 'there remains a residue of independent and lawful information sufficient to support probable cause.'" *Id.* at 718 (quotation omitted).

As discussed, the confidential informant participated in a carefully-executed controlled

² As discussed above, the search warrant applicant also summarized allegations with respect to a third person, Lynde Noel. *See* Dkt. No. 43-1 at 16. The Government notes that, upon further investigation, well after the application was written, it was determined that Defendant was not responsible for Ms. Noel's death. *See* Dkt. No. 46 at 7-8 n.2. Considering the totality of the circumstances, putting aside this erroneous information, the Court finds that probable cause to issue the search warrant still existed.

buy, in which he was continuously monitored and surveilled by law enforcement and Defendant does not dispute that the application accurately summarized what happened during the buy.

Defendant cites a number of facts that he claims undermine that confidential informant's credibility. *See* Dkt. No. 43-1 at 8. For example, Defendant claims the following facts undermine his credibility and should have been included in the search warrant application: (1) that the confidential informant was a heroin addict and at the time of his testimony he was taking Suboxone; (2) he receive an other than honorable discharge from the United States Army; (3) he had sold or given his Suboxone to friends of his "a few times;" (4) he informed the grand jury that he had lied on past occasions; (5) he had lied about his use of heroin since his wife's death; (6) he had lied about whom he had told that he was a confidential informant; (7) he lied when he had previously stated that he had never sold controlled substances; and (8) in the past he had sold marijuana, benzodiazepines, and mushrooms. *See id.* None of theses facts, individually and collectively, undermine the probable cause for the search, as established through, among other things, the controlled buy. *See Canfield*, 212 F.3d at 721 (vacating the district court's suppression order and finding that the confidential informant's undisclosed criminal history did not reflect on his veracity and that the affidavit's inaccuracies did not otherwise taint the unchallenged portions of the affidavit).

Based on the foregoing, the Court finds that the search warrant application was supported by probable cause and, therefore, Defendant's motion to suppress is denied.

3. Good Faith Exception

"The exclusion of evidence obtained in violation of the Fourth Amendment is a 'prudential' remedy, crafted by the Supreme Court 'to compel respect for the constitutional guaranty.'" *United States v. Raymonda*, 780 F.3d 105, 117 (2d Cir. 2015) (quoting *Davis v.*

United States, 564 U.S. 229, 236, 131 S. Ct. 2419, 2426, 180 L. Ed. 2d 285 (2011)). "Neither a 'personal constitutional right' nor a means to 'redress the injury' of an unconstitutional search, the exclusionary rule is designed to deter future Fourth Amendment violations." *Id.* (quotation omitted). Because the remedy exacts a heavy toll on the justice system, however, the exclusionary rule does not apply whenever suppressing evidence "might provide marginal deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009) (quotation omitted). "The rule's corrective value justifies its cost when the police 'exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.'" *Raymonda*, 780 F.3d at 117-18 (quoting *United States v. Stokes*, 733 F.3d 438, 443 (2d Cir. 2013)). "But when police act with 'an objectively reasonable good-faith belief that their conduct is lawful,' or when their conduct involves only 'simple, isolated negligence,' exclusion simply 'cannot pay its way.'" *Id.* at 118 (quotation omitted).

"In light of this principle, courts have recognized that evidence obtained by officers 'in objectively reasonable reliance' on a warrant subsequently invalidated by a reviewing court is not generally subject to exclusion." *Raymonda*, 780 F.3d at 118 (quotation omitted). "When an officer genuinely believes that he has obtained a valid warrant from a magistrate and executes that warrant in good faith, there is no conscious violation of the Fourth Amendment, 'and thus nothing to deter.'" *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 920-21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)). "To claim the benefits of the good faith exception, however, the officer's reliance on the duly issued warrant 'must be objectively reasonable.'" *Id.* (quotation omitted). "Accordingly, the good faith exception cannot shield even an officer who relies on a duly issued warrant in at least four circumstances: '(1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the

warrant is so facially deficient that reliance upon it is unreasonable.'" *Id.* (quoting *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011)). "The Supreme Court has since clarified that these limitations apply not merely in cases of deliberate police misconduct, but also in situations where an officer is 'reckless' or 'grossly negligent' in seeking or executing a warrant." *Id.* (quoting *Herring*, 555 U.S. at 144, 129 S. Ct. 695) (other citation omitted).

In his motion, Defendant alleges that Judge Nichols was misled by Investigator Behrens when he failed to identify that Mr. Spagnola was the confidential informant. As the Government points out, however, there is generally a very straightforward and legitimate reason for not providing the identities of confidential informants, their own protection. Nothing in the record indicates that the omission was in bad faith or that the state judge was knowingly misled. None of the circumstances listed above prevent the application of the good faith exception.

While the search warrant application should have provided Judge Nichols with information concerning the confidential informant's reliability, such as the fact that he was a heroin user whose wife had just died of an overdose, the failure to do so is not indicative of bad faith. Such information is only of critical importance when a controlled buy is not carefully executed by the police, which was not the case in the present matter. *See Davis*, 2014 WL 5305984, at *17.

Accordingly, the Court holds that, even if the search warrant was not supported by probable cause, suppression of the evidence is unwarranted because of the application of the good faith exception.

4. *Franks* Hearing

Defendant contends that "[a]n evidentiary hearing is necessary to determine what information was available to the State Police at the time the warrant application was prepared and

the reasons for the inclusion of some information and the exclusion of other information by Inv. Behrens when he submitted the Application to Judge Nichols." Dkt. No. 43-1 at 8-9. Defendant further asserts that he "is interested in learning whether Mr. Spagnola was informed that he could be held criminal responsible for the death of Sierra Spagnola, for the possession and/or sale of heroin or any other criminal act which may have been known by law enforcement at the time Inv. Behrens prepared the Application and if any plea agreement or cooperation agreement for Mr. Spagnola was discussed or drawn up." *Id.* at 9.

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Warrants Clause mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "There is . . . a presumption of validity with respect to the affidavit supporting [a] search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). "In certain circumstances, however, a defendant may challenge the truthfulness of factual statements made in the affidavit, and thereby undermine the validity of the warrant and the resulting search or seizure." *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (footnote and citations omitted). "However, '[e]very statement in a warrant affidavit does not have to be true.'" *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000) (quotation omitted).

In *Franks v. Delaware*, the Supreme Court held that, although generally a defendant may not challenge the veracity of a sworn statement that the police used to procure a search warrant, the Fourth Amendment requires that the court hold a hearing to determine the veracity of such statements if the defendant requests such a hearing and makes a substantial preliminary showing that (1) the affiant made "a false statement knowingly and intentionally, or with reckless disregard for the truth," and that (2) "the allegedly false statement [was] necessary to the finding of

probable cause[.]" *Franks*, 438 U.S. at 155-56.

To determine if the false information was necessary to the issuing judge's probable cause determination, *i.e.*, material, "a court should disregard the allegedly false statements and determine whether the remaining portions of the affidavit would support probable cause to issue the warrant." . . . If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate.

Canfield, 212 F.3d at 718 (internal quotation omitted). Thus, "[t]he ultimate inquiry is whether, after putting aside erroneous information and material omissions, 'there remains a residue of independent and lawful information sufficient to support probable cause.'" *Id.* (quotation omitted).

It is the defendant's burden to demonstrate that alleged misrepresentations or omissions in the affidavit were "the result of the affiant's deliberate falsehood or reckless disregard for the truth." *Id.* at 717-18. "This inquiry, which looks to the mental states of mind of government officials, is said to be a 'subjective' test rather than an 'objective' one." *United States v. Rajaratnam*, 719 F.3d 139, 153 (2d Cir. 2013) (quotation omitted). It asks whether the alleged misrepresentation or omission was "'designed to mislead' or was 'made in reckless disregard of whether [it] would mislead.'" *Id.* at 154 (quotation omitted).

As set forth above, Defendant has not credibly alleged any misstatements, errors, omissions, or deception by Investigator Behrens in the search warrant application, much less material misconduct that affect that probable cause supporting the warrant. As such, to the extent that Defendant is requesting a *Franks* hearing, that request is denied.

B. Suppression of Defendant's Statements

Defendant's only argument in support of suppression of his post-*Miranda* statement is that

it is fruit of the poisonous tree because an invalid search warrant led to his arrest. Having determined that the search warrant was supported by probable cause, Defendant's motion to suppress his statements is denied.

C. Other Crimes, Wrongs or Acts

Defendant moves, pursuant to Rule 404(b) of the Federal Rules of Evidence, for an order requiring the Government to disclose any other crime, wrong, or act which the Government intends to introduce at trial. *See* Dkt. No. 43-2 at 2. In response, the Government states that at this time it has no plans to introduce any other acts and it will revise this disclosure as necessary ahead of trial. *See* Dkt. No. 46 at 14.

In light of the Government's response, this aspect of Defendant's motion is denied without prejudice.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's motion for omnibus relief (Dkt. No. 43) is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: March 15, 2019
Albany, New York


Mae A. D'Agostino
U.S. District Judge